UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOHN ANTHONY TESLA,[1]	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil Docket No. 96-81-B-DMC***
	)	
MAINE DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION,[2]	)	
	)	
Defendant	)	

MEMORANDUM DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT[3]

The plaintiff, John Anthony Tesla, brings this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*., 42 U.S.C. § 1981, and the Maine Human Rights

[1] The plaintiff filed this action under the name Derrick R. Russo, Complaint (Docket No. 2), but has used the name John Anthony Tesla throughout this proceeding.

[2] The complaint lists seven additional individual defendants in its caption, Docket No. 2, but it includes no allegations concerning the identity of two of these individuals, or the residence or individual liability of any of these persons. The court's records do not reflect that service has been made on any of these individuals. The defendant did attempt to amend the complaint to "join" twelve individual defendants, including the seven listed in the caption of the complaint, but that motion was stricken by the court. Docket No. 9. The Department is the only defendant that has been served with process.

[3] Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

Act, 5 M.R.S.A. § 4551 *et seq.*, alleging that he was the victim of discrimination based on his national origin when he was not hired in 1994 for the position of state electrical inspector. The defendant, an agency of Maine state government, includes the Electricians' Examining Board, to which the electrical inspector hired was assigned to work. The defendant moves for summary judgment on all counts of the complaint. The plaintiff's objection to the motion includes a "motion to strike" the motion for summary judgment. The plaintiff provides no support for his motion to strike; it must be denied. I grant the defendant's motion for summary judgment.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). "Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a genuine and material issue for trial." *Id*. at 73 (citations omitted); Fed. R. Civ. P. 56(e); Local Rule 19(b)(2). A fact is "material" if it may affect the outcome of the case; a dispute is "genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

II. Factual Background

Viewed in the light most favorable to the plaintiff, the summary judgment record reveals the following facts: In July 1994 the plaintiff, whose name at the time was Derrick Russo, applied for a position of electrical inspector within the Division of Licensing and Enforcement of the defendant Department of Professional and Financial Regulation. Affidavit of John Anthony Tesla (Docket No. 29) ("Tesla Aff.") ¶ 8; Affidavit of Geraldine Betts (Docket No. 21) ("Betts Aff.") ¶ 6. The position is one of six specifically assigned to the Maine Electricians' Examining Board. Betts Aff. ¶ 3. The plaintiff's name appeared on a register of applicants for the position, and his name was submitted to the defendant as one of the twelve applicants with the six highest scores of the individuals appearing on that register. *Id*. ¶ 6. The twelve applicants were interviewed on August 15 and 16, 1994 by a five member group that included two of the Division's electrical inspectors, two members of the Board, and the Department's regulatory board coordinator. *Id*. ¶ 8.

Each candidate was evaluated individually by all group members, using a scoring matrix keyed to questions that were intended to be posed to all applicants. *Id*. ¶¶ 9-12 & Exh. 2. After the interviews were completed, the scores of the applicants were aggregated. Id. ¶ 13; Attachment 6 to Defendant's Response to Document Request, Submission Eight of Plaintiff's Eight Submissions (Docket No. 11), incorporated by reference in Defendant's Response to Plaintiff's Second Set of Requests for Production of Documents, attached to Tesla Aff. The plaintiff's raw score was seventh of the twelve applicants. Affidavit of William Macomber (Docket No. 18) ("Macomber Aff.") ¶ 4; Attachment 6, Plaintiff's Eight Submissions. The job was offered to and accepted by a higher-rated applicant named Jeffrey Morin. Betts Aff. ¶ 13. No information concerning the applicants' ethnic or national origin was given to the evaluating group. *Id*. ¶ 7; Macomber Aff. ¶ 3.

The plaintiff filed a complaint with the Maine Human Rights Commission ("MHRC") on November 1, 1994 alleging that the defendant discriminated against him due to his Italian ancestry. Maine Human Rights Commission Investigator's Report ("Investigator's Report"), attached to Defendant's Statement of Material Facts Not in Dispute (Docket No. 20) at 1-2. The charge was also filed with the Equal Employment Opportunity Commission, which issued a right-to-sue letter dated March 3, 1996. Tesla Aff. ¶ 12. The state investigator found no reasonable grounds to believe that the plaintiff had been discriminated against because of his Italian ancestry. Investigator's Report at 3-4. The plaintiff filed this action on March 30, 1996.

The plaintiff has provided extensive additional information that is not relevant to his claim that the defendant discriminated against his application for this position due to his national origin.

III. Analysis

A. Section 1981 Claim

The defendant seeks summary judgment on this claim on the grounds that 42 U.S.C. § 1981 applies only to discrimination based on race. The plaintiff states that he "does not believe he was discriminated against because of his race . . . . The plaintiff does believe he was discriminated against because of his Italian national origin." Motion to Deny or Strike Defendant's Motion for Summary Judgment (Docket No. 27) ("Plaintiff's Motion") at 6. Because it is not clear from this statement whether the plaintiff continues to press a claim under section 1981, it is necessary to address that possible claim here.

"Racial animus is a necessary element of a claim" under section 1981. *Springer v. Seamen*, 821 F.2d 871, 880 (1st Cir. 1987). Claims based on Italian ethnicity or national origin are not

cognizable under section 1981. *Bisciglia v. Kenosha Unified Sch. Dist. No. 1*, 149 F.R.D. 588, 591 (E. D. Wisc. 1993), *mod. on other grounds*, 45 F.3d 223 (7th Cir. 1995); *Petrone v. City of Reading*, 541 F. Supp. 735, 738-39 (E. D. Pa. 1982). If the plaintiff has not withdrawn his claim under section 1981, the defendant is entitled to summary judgment on that claim.

B. Federal Civil Rights Claim

The plaintiff asserts that he is raising claims of both disparate treatment and disparate impact under 42 U.S.C. § 2000e-2. Disparate treatment claims are based on actions of an employer that treat one or more employees or applicants for employment less favorably than others due to race, color, religion, sex or national origin. *Id*. § 2000e-2(a)(1); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 (1977). Disparate impact claims are based on facially neutral employment practices which have a disproportionately negative effect on a protected group and which cannot be justified by business necessity and by factors related to the job at issue. 42 U.S.C. § 2000e-2(k)(1)(A)(1); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986, 991 (1988).

1. Disparate Impact

In order to establish a prima facie case of disparate impact under section 2000e, first

> the plaintiff must identify the challenged employment practice or policy, and pinpoint the defendant's use of it. Second, the plaintiff must demonstrate a disparate impact on a group characteristic, such as race, that falls within the protective ambit of Title VII. Third, the plaintiff must demonstrate a causal relationship between the identified practice and the disparate impact.

EEOC v. Steamship Clerks Union, 48 F.3d 594, 601 (1st Cir. 1995) (citations omitted). If the plaintiff makes no effort to show that a practice of a particular workplace regularly yields a discriminatory result, he has no disparate impact claim. *Foster v. Dalton*, 71 F.3d 52, 57 (1st Cir. 1995).

> Plaintiffs must identify a specific employment practice and show that the practice caused the disparate impact. Ordinarily this means that a plaintiff must point to a specific practice which is a component of the employer's decisional process, such as a test or an experience requirement, rather than to the decisional process as a whole.

Graffam v. Scott Paper Co., 870 F. Supp. 389, 395 (D. Me. 1994). In some cases, however, the entire subjective decisional process may be analyzed as one practice. *Id.*

The plaintiff does not specify any practice of the defendant which regularly yields the discriminatory result of which he complains -- exclusion of individuals with Italian surnames from employment. It is possible to interpret his presentation as an allegation that the subjective decisional process of interviews following the creation of a register, upon which the plaintiff's name appeared, is the specific employment practice to which he refers. However, the plaintiff alleges that the defendant's standard practice regarding those interviews was not followed in his case[4] so that he does not claim that he was injured by a regular or standard facially neutral employment practice of the defendant. Even without this deficiency, the plaintiff's asserted basis for this claim appears to be only that the defendant employs a disproportionately low number of people with Italian surnames. "This is insufficient to establish a prima facie case of discrimination, even under a liberal application

[4] The plaintiff's proffered evidence that another individual who was interviewed for the position may not have been asked the same questions as the other applicants, Exh. H to Plaintiff's Motion, is an unsworn handwritten statement that does not meet the requirements of Fed. R. Civ. P. 56 for summary judgment motions and therefore, having been objected to, may not be considered by this court.

of the disparate impact model." *Latinos Unidos de Chelsea en Accion v. Secretary of Hous. & Urban Dev.*, 799 F.2d 774, 786 (1st Cir. 1986).

Even if the plaintiff had produced sufficient evidence on the first element of his prima facie burden, he would fail at the second element. He offers evidence only concerning the surnames of current employees of the defendant.[5] He makes no effort to show that the alleged impact, a low percentage of Italian surnames, is disparate — *i.e.*, that the percentage differs in a statistically significant manner from the percentage of Italian surnames in the Maine population of electrical inspectors in general, or in whatever the relevant labor market for the position of state electrical inspector may be. "It is . . . a comparison — between the [protected class] composition of the qualified persons in the labor market and the persons holding at-issue jobs — that generally forms the proper basis for the initial inquiry in a disparate-impact case." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51 (1989). The statistical disparities must be "sufficiently substantial that they raise . . . an inference of causation." *Watson*, 487 U.S. at 995.[6]

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[5] The plaintiff asserts that he is "unable to proceed with this theory," Plaintiff's Motion at 19, because the defendant has failed to provide him with the names of the members of every state licensing and regulatory panel within the purview of the defendant. This is an incorrect view of the relevant body for comparison. The members of these panels are appointed by persons other than the defendant; they are not employed by the defendant. *See generally* 32 M.R.S.A. § 59 *et seq*. The appropriate statistical basis for an analysis of a claim of disparate impact cannot include individuals whom the defendant does not employ or select.

[6] The defendant has provided data from the 1990 U. S. Census, attached to its memorandum in support of its motion for summary judgment ("Defendant's Memorandum") (Docket No. 17), suggesting that some 4.0% of the Maine population identifies itself as being of Italian descent (51,616 of a total of 1,227,928). Several of the surnames of the employees of the defendant appear to be Italian in origin, Professional and Financial Regulation Employee Roster, Exh. 3 to Betts Aff., but it remains the plaintiff's burden to present the actual percentage of such surnames among the defendant's employees and to provide the court with evidence of the statistical significance of any deviations between the two figures. This he has not done.

There is no showing on this record of any statistical disparity sufficient to establish a prima facie case of disparate impact. *See Cuello-Suarez v. Puerto Rico Elec. Power Auth.*, 988 F.2d 275, 278 (1st Cir. 1993) (disparate impact case requires sophisticated statistical comparison between impact on a victim class and that on non-victim class eligibles in relevant labor pool). The defendant is entitled to summary judgment on this claim.

2. Disparate Treatment

"In a disparate treatment case, proof of discriminatory motive or intent is essential." *Sabree v. United Bhd. of Carpenters & Joiners*, 921 F.2d 396, 402 (1st Cir. 1990) (internal quotation marks and citation omitted). When a plaintiff is unable to offer direct proof of the defendant's alleged discriminatory animus, as is the case here, the burden of producing evidence is allocated according to the three-step framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). Under this framework, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. *Udo v. Tomes*, 54 F.3d 9, 12 (1st Cir. 1995). A plaintiff whose claim arises out of an application for employment meets this burden, which is "not onerous," *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), by showing

> (i) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802. Once the plaintiff has made out a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the rejection of the applicant. *Sabree*, 921 F.2d at 403. To meet this burden, the defendant "need only produce

admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Burdine*, 450 U.S. at 257. If the defendant meets this production burden, the plaintiff may then show that the stated reason was pretextual, "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256.

> [O]nce the employer articulates a legitimate, nondiscriminatory reason for [not hiring the plaintiff], to avoid summary judgment, the plaintiff must introduce sufficient evidence to support two findings: (1) that the employer's articulated reason for [the action] is a pretext, and (2) that the true reason is discriminatory.

Udo, 54 F.3d at 13.

Here, the defendant concedes for the purposes of its motion for summary judgment that the plaintiff has established the first three elements of a prima facie case. Defendant's Memorandum at 9. It contends, however, that the plaintiff has not established the fourth requirement because he has not provided evidence that the applicant selected for the position was not of Italian descent.[7] *Id*. at 9-10.

The only evidence provided by the plaintiff on this point is the plaintiff's own statement that

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[7] It is also clear that, contrary to the plaintiff's representations, the position for which he applied did not "remain open," nor did the defendant continue to seek applicants after it rejected his application. The successful applicant was included on the same register of eligible applicants on which the plaintiff's name appeared, and he was one of the twelve applicants interviewed over a two-day period by the panel that made the employment decision. Exhs. 4 & 5 to Tesla Aff. He was offered and accepted the position before the plaintiff was informed by letter that he had not been selected. Betts Aff. ¶¶ 13 & 14. However, a plaintiff can also make the showing required by the fourth element of the *McDonnell Douglas* prima facie case framework by showing that the position he sought was filled with someone outside the protected class. *Bina v. Providence College*, 39 F.3d 21, 24 (1st Cir. 1994).

"[t]he selected candidate, Jeffrey Morin is of French origin," Tesla Aff. ¶ 14, and the statement under the heading "Development Of Facts" in the MHRC report that "[r]ecords of the interview process show ... [t]he selected candidate had a French surname," Investigator's Report at [2]-[3]. The evidence cited by the plaintiff to support his own statement, a page from a telephone book listing a Francis E. Morin, alleged without evidentiary foundation to be the successful candidate's father, at an address of "19A French Old Town," Exh. 9A to Tesla Aff., and a page from an unidentified text listing last names, with the entry "Morin (*Fr.),*" Exh. 9B to Tesla Aff., is insufficient for the purposes of a motion for summary judgment. However, the defendant itself relies on the MHRC report in other contexts, and that document does appear to be an acceptable evidentiary source on this point at this time. The plaintiff has met his burden of establishing a prima facie case.

The burden of production therefore shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its decision not to hire the plaintiff. The defendant states that it selected Morin rather than the plaintiff for the position because Morin "achieved the highest collective score of any candidate based on questions and criteria related solely to knowledge and skills required for the electrical inspector position." Defendant's Memorandum at 11. The plaintiff acknowledges that the defendant has met its burden of production. Plaintiff's Motion at 17-18. It is therefore the plaintiff's task at this point to introduce sufficient evidence that the defendant's stated reason was a pretext and that its true reason was discriminatory.

The plaintiff offers the following evidence in an attempt to discharge this burden: (1) the defendant does not mention that it must receive the advice and consent of the Electricians' Examining Board before selecting an electrical inspector; (2) two of the questions presented in the interviews were "in violation of the City of Portland, Maine, Electrical Code, designed specifically

for the plaintiff;" (3) Morin was not the highest qualified applicant and should never have been eligible for an interview; (4) William Macomber, a member of the interviewing panel, lied to the plaintiff when he asked about the answer to the first interview question after the interview was completed; (5) Morin lacks certain required knowledge for the position; (6) the interview process was a test; (7) Macomber made numerous discriminatory statements on the plaintiff's scoring grid; (8) there are no male employees with Italian surnames in the division of the defendant which includes the position for which the plaintiff applied; (9) Morin was well known to the evaluating panel, as evidenced by the use of his nickname and the statement that he was an electrical inspector from Bangor made by one member of the panel; (10) not all applicants were asked the questions that appear on the department's interview scoring grids; (11) Morin completed only one electrical inspection for the Town of Old Town; and (12) Macomber knew that Morin was not an experienced electrical inspector and nonetheless helped him to qualify for the register of names that provided the basis for the interviews. Plaintiff's Motion at 18-19.

The plaintiff provides no acceptable evidentiary support for his assertions numbers 5, 7, 9, 10, and 11, and they will not be discussed further. *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 95 (1st Cir. 1996) (unsupported factual allegations by party opposing summary judgment properly disregarded by court). The plaintiff provides no explanation of the relevance of his assertion number 6 to his claim, and the court is able to discern none.

On the plaintiff's first assertion, he provides no citation to the alleged requirement for advice and consent of the Board to the defendant department's hiring process. In any event, two members of the Board were among the five interviewers. Betts Aff. ¶ 8. Without evidence of the actual requirement upon which the plaintiff relies, the court is unable to credit this assertion. In addition,

this failure by the defendant, if indeed it was a failure, does not show that the defendant discriminated among applicants for employment on the basis of national origin.

The plaintiff's second assertion is that two of the questions asked at the interview were drafted so that the answers sought by the panel would be in violation of the electrical code of the City of Portland, where the plaintiff had previously been employed. If true, this allegation would tend to show bias against the plaintiff personally, but only if the plaintiff had submitted evidence that none of the other applicants had ever served in positions governed by that code; that none of the applicants for this statewide position were informed that their answers to the questions were to be based on national standards or something other than the local codes with which they might be familiar; and that Macomber, the primary author of the questions, Betts Aff. ¶ 9, knew when he drafted those questions that the answers would violate the Portland code, that the plaintiff was a former electrical inspector for Portland likely to be tripped up by the questions, and that none of the other applicants was familiar with that code. The plaintiff has made no such evidentiary showing. Even if he had made some evidentiary showing along these lines, the plaintiff offers nothing to suggest that the personal bias demonstrated by such a showing is also directed at his national origin. It is significant in this regard that the plaintiff offers nothing other than the word "doubtful," Plaintiff's Motion at 14, to contest the sworn evidence offered by the defendant that neither the panel nor the defendant had any information at any time concerning the national origin of any of the applicants for the position, Betts Aff. ¶ 7, Macomber Aff. ¶ 3.

On his third assertion, the plaintiff does offer some evidence that Morin in fact was not the candidate rated highest by the interview panel. Attachment 6 to the Department's Response to the MHRC Document Request, a document entitled "Electrical Inspector Interviews," shows Morin with

a score of 296 and another individual with a score of 299. The plaintiff's score is 241, seventh among the twelve applicants listed. However, the fact that the second-highest ranked applicant was offered the job does not indicate the presence of pretext or discrimination based on national origin with regard to the plaintiff. The only individual scoring higher than Morin on this chart is named Sterns. The plaintiff offers no evidence that this is an Italian surname. Favoritism for Morin, if it existed as alleged by the plaintiff, is not evidence of discrimination against the plaintiff based on his national origin. It is important to note that the assertion that the plaintiff was more qualified than the person hired is insufficient to prove pretext. *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988). The summary judgment record presents no evidence to support the plaintiff's assertion that Morin should never have been eligible for an interview.

The plaintiff's fourth assertion is based on an answer by Macomber to a question posed to him by the plaintiff after his interview concerning one of the questions asked during the interview. The parties agree that Macomber admits that his answer was incorrect. The defendant correctly points out that a mistake by the employer does not equal a pretext. *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995). Under the circumstances of this case, the fact that Macomber gave an incorrect answer concerning the solution to the problem posed by one of the questions asked during the interview does not allow a fact finder to infer the existence of discriminatory animus based on national origin.

On the plaintiff's eighth assertion, it must first be noted that the plaintiff's claim is not based on gender discrimination, and that the gender of current employees of the defendant is therefore irrelevant. The plaintiff's attempt to limit the pool of current employees which forms the basis for his comparison to one division of the defendant is unsupportable; there is no reason why the

defendant's entire employee pool should not be examined for Italian surnames. When that approach is taken, the number of such surnames increases significantly. The defendant addresses this assertion merely by stating that it is a fact that relates only to a claim of disparate impact. However, it may be possible to infer from the absence of employees of a certain national origin in an employer's workforce that some discriminatory animus is at work, if there is a significant number of such individuals in the available labor market for such positions. *See United States v. Fairfax County*, 629 F.2d 932, 939 (4th Cir. 1980). Even so, the plaintiff has not presented such evidence here.

The plaintiff's twelfth and final assertion is based on an assumption that is not supported by the summary judgment record. There is no stated requirement that applicants for the position be "experienced electrical inspectors"[8] in any of the material in the summary judgment record. The advertisement of the vacancy states that the requirements are "ten (10) years experience in the electrician field and possession of a current, valid Maine Master Electrician License." Exh. 1 to Tesla Aff. The Career Opportunity Bulletin for the position notes that the minimum requirement for the position is the possession of such a license, and that applicants will be evaluated in the performance areas of level and relatedness of formal post-secondary education, breadth of experience as a licensed electrician, and related investigatory or enforcement experience. Exh. 1 to Betts Aff. The remaining allegations in this assertion consist of the plaintiff's conclusions concerning the motives and actions of a single member of the review panel concerning the successful applicant. There is no evidentiary support for these conclusions. *See Sanchez v. Philip Morris Inc.*, 992 F.2d 244, 248 (10th Cir. 1993) (favoritism not equivalent of intent to unlawfully discriminate).

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[8] A court is not required to assume that applicants with less experience than the plaintiff are therefore less qualified for the position. *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 141 (1st Cir. 1985).

Because the plaintiff has presented insufficient evidence to allow a factfinder to find pretext and actual discriminatory motive based on national origin on the part of the defendant, the defendant is entitled to summary judgment on his disparate treatment claim.

C. State Law Claims

The Maine Law Court has specifically adopted the *McDonnell Douglas* order of proof for claims under the Maine Human Rights Act. *Maine Human Rights Comm'n v. City of Auburn,* 408 A.2d 1253, 1261-62 (Me. 1979). This court has always evaluated the evidence in federal Title VII claims and Maine Human Rights Act claims in an identical manner. *E.g., Duplessis v. Training & Dev. Corp*., 835 F. Supp. 671, 677 (D. Me. 1993) (national origin discrimination); *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1511 (D. Me. 1991) (racial discrimination). Because the defendant is entitled to summary judgment on the Title VII claims in this case, he is entitled to summary judgment on the state-law claims as well. *Weeks v. State of Maine*, 871 F. Supp. 515, 517 (D. Me. 1994).

IV. Conclusion

For the foregoing reasons, the plaintiff's motion to strike or deny is **DENIED** and the defendant's motion for summary judgment is **GRANTED** as to all claims.

Dated at Portland, Maine this 20th day of March, 1997.

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David M. Cohen
United States Magistrate Judge